IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT

JAIPUR BENCH JAIPUR

ORDER

S.B. CIVIL WRIT PETITION NO. 4072/1993

MAHESH BEHARI GUPTA & Ors.V. THE STATE OF RAJASTHAN & ORS.

Date of Order ::: August 31,2006

PRESENT

HON'BLE MR. JUSTICE PREM SHANKER ASOPA

Mr. Sandeep Saxena, for the petitioners
Mr. Sandeep Pathak on behalf of
Mr. Bharat Vyas, AAG for the respondents.

REPORTABLE BY THE COURT

(1) The instant writ petition has been filed by 17 Accounts Officers, all of them have retired from service, challenging applicability of the amendment dated 18.8.1992 with retrospective effect i.e. from 25.1.1992 as well as Para 13 of the general selection scale order dated 25.1.1992. The petitioners have further prayed that respondents be directed to make proper fixation on the post held by them at the relevant time i.e. the post of Accounts Officer, as per main rule 26A

RSR and for further consequential benefits.

(2) The facts, in brief, of the case are that all the petitioners entered in the service on being selected by the Rajasthan Public Service Commission on the post of Accountant between 1965 to 1969 and subsequently, all of them had been promoted as Assistant Accounts Officer in the year 1981 and 1982 and thereafter, from the post of Assistant Accounts Officer promoted to that of Accounts Officer in July, 1992 on the recommendations of the DPC against the vacancies of the year 1992-93 vide order dated 2.7.1992. While the petitioners were working on the post of Assistant Accounts Officer, which is a subordinate service post, all of them had been granted selection scale of Rs.2000-3500 vide order dated 28.2.1992 (Annexure-4) on completion of 18 years' service as per notification dated 25.1.1992. They have no grievance regarding their fixation in the said selection scale. Their grievance is that pay of some of them fixed on the promoted post of Accounts Officer (State service post) in the pay scale of Rs.2200-4000 after giving the benefit of Rule 26-A which was withdrawn and recoveries were made in view of notification dated 18.8.1992 (Annexure-5) whereby Note-4 below Rule 26A RSR was amended w.e.f. 25.1.1992. Consequently, their pay was fixed/re-fixed as per the amendment on account of which they have suffered loss of

approximately Rs.400/- per month till their retirement and thereafter also the same has further adversely affected their pensionary benefits. The petitioners have submitted a Chart as `Schedule-A' mentioning the date of order of first appointment in service, date of order of promotion as Assistant Accounts Officer, date of order of granting selection scale with pay scale and date of order of promotion as Accounts Officer under the Rajasthan Accounts Service with the year of allotment and pay scale. The same is reproduced hereunder for convenience:

S.No.	Name	Date of order of 1st apptt. in sub.service	Date of order of promotion as AAO	Date of order of granting selection grade with grade	Date of order of promotion in R.Ac.S.with year of allotment and pay scale
1.	2.	3.	4.	5.	6.
			2000-3500	2200-4000	
	Sarva Shri				
1.	Mahesh Behari Gupta	15.1.66	20.8.81	28.2.92	2.7.92(92-93)
2.	P.D. Singhal	18.4.69	16.2.82	23.3.92	-do-
3.	Tej Singh Rathore	15.1.66	20.8.81	28.2.92	-do-
4.	Man Mohan Shukla	15.1.66	20.8.81	28.2.92	-do-
5.	Balbir Singh Tyagi	15.1.66	20.8.81	28.2.92	-do-
6.	Sitaram Sharma	15.1.66	20.8.81	28.2.92	-do-
7.	N.K.Chaturvedi	22.11.65	25.7.81	28.2.92	-do-
8.	Ghanshyam Sharma	18.4.69	16.2.82	23.3.92	-do-
9.	Udho A. Motiani	2.12.65	25.7.81	28.2.92	-do-
10.	Sumati Chand Jain	15.1.66	12.8.81	28.2.92	-do-
11.	Ganesh Narain Mathur	2.12.65	25.7.81	28.2.92	-do-
12.	Nawal Kishore Sharma	19.4.69	30.3.82	25.1.92	18.7.92(92-93)
13.	Boyat Singh Verma	15.1.66	20.8.81	28.2.92	2.7.92(92-93)
14.	Omprakash Mahajan	15.1.66	20.8.81	28.2.92	-do-
15.	SP Srivastava	18.4.69	16.2.82	23.3.92	-do-
16.	K.K.Gupta	27.1.66	20.8.81	28.2.92	-do-

17. Moolchand Kewalia 30.8.65 17.3.81 28.2.92 -do-

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(3) The State of Rajasthan has filed reply to the writ petition wherein it has been asserted that the selection grades introduced by the government vide order dated 25.1.1992 (Annexure-3) is in lieu of promotion and in para 13 of the aforesaid it has clearly been mentioned that in case of an employee who gets his regular promotion after getting the selection grade (identical to or lower than the pay scale of promotion post), his pay shall be fixed in the pay scale of promotion post at the equal stage and if there is no equal stage in the pay scale of promotion post, the pay shall be fixed at the next higher stage. It has further been stated by the State of Rajasthan that the petitioners have already been allowed fixation benefit accrued to them in accordance with the aforesaid general selection scale order dated 25.1.1992. The amendment dated 18.8.1992 in Rule 26-A amending Note 4(i) is formal amendment on the same line of the provision contained in para 13 of the order dated 25.1.1992.

(4) Submission of the learned counsel for the petitioners is that a right is vested/accrued in them for fixation of their pay on the post of Accounts Officer on account of promotion order dated 2.7.1992 under main Rule 26-A RSR which cannot be divested/snatched by way of amendment of Note-4(i) of Rule 26A dated 18.8.1992 with

retrospective effect i.e. w.e.f. 25.1.1992. Learned counsel further submits that the petitioners were promoted on the post of Accounts Officer on 2.7.1992 therefore, their fixation is required to be made in accordance with main Rule 26A RSR as it existed on that day and amendment in Note 4(i) below Rule 26-A RSR made on 18.8.1992 made effective from 25.1.1992 cannot be allowed to take away the said vested right. Retrospective legislation which takes away the aforesaid vested right is violative of Articles 14 and 16 of the Constitution of India. The general selection scale order dated 25.1.1992 will not apply to the petitioners on account of their promotion in the State Service post of Accounts Officer as the said general selection grades are applicable to Class-IV, ministerial and subordinate service. Otherwise also, the rule which was in existence at the relevant time i.e. main Rule 26-A RSR cannot be allowed to be amended or altered by an executive order dated 25.l.1992.

(5) Learned counsel appearing on behalf of the State of Rajasthan submits that the petitioners had been given benefit of fixation while fixing their pay in selection scale. The same benefit of fixation as per Rule 26-A RSR cannot be given again on their promotion to the State Service. They are not entitled to get double benefit of the fixation. Learned counsel for the State has also submitted the amendment of Note 4(i) below Rule 26A RSR is formal amendment to give effect to

the existing general selection scale order dated 25.1.1992.

(6) I have gone through the record of the writ petition and considered the rival submissions of the learned counsel appearing for the parties.

(7) Before proceeding further, it would be useful to quote the relevant provisions. Rule 26-A(i) and amended Note 4(i) below Rule 26-A RSR read as under:

> **"26A(1) When a Government servant holding a post in a substantive, temporary or officiating capacity is promoted to a post in the regular line of promotion in his service, cadre or department, in a substantive, temporary or officiating capacity, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing the actual pay drawn by him in the lower post by one increment at the stage at which such pay is drawn:"**

"Government of Rajasthan
Finance (Gr.2) Department

Notification

No.F.1(55)FD(Gr.2)/82 Jaipur, dated the 18th August,1992

Sub: Amendment in Rajasthan Service Rules – Rule 26A.

In exercise of the powers conferred by proviso to Article 309 of the Constitution of India, the Governor hereby makes the following rules to amend further the Rajasthan Service Rules, namely:-

1. These rules may be called the Rajasthan Service (Amendment) Rules, 1992.
2. They shall be deemed to have come into force with effect from 25.1.1992.
3. In the said rules the existing Note 4 appearing below Rule 26A shall be **substituted** by the following, namely -

"4(i) In case where a Government servant gets his regular promotion after getting the Selection Grade (identical to or lower than the pay scale of the promotion post), his pay shall be fixed in the pay scale of the promotion post at the equal stage and if there is no equal stage at the next higher stage.

(ii) In case where the Selection Grade (second or third) already granted to a Government servant is higher than the pay scale of the promotion post the Government servant shall continue to draw pay in the selection grade and his pay

shall not be fixed in the pay scale of the promotion post.

By Order of the Governor,
Sd/- (Ram Avtar)
Deputy Secretary to the Government"

(8) Para 13 of the general selection scale order dated 25.1.1992 reads as under:

> **"13. In case of an employee who gets his regular promotion after getting the selection grade (identical to or lower than the pay scale of the promotion post), his pay shall be fixed in the pay scale of the promotion post at the equal stage. If there is no equal stage in the pay scale of the promotion post, pay shall be fixed at the next higher stage. In cases where the Selection Grade (second or third) already granted to an employee is higher than the pay scale of the promotion post, the employee shall continue to draw pay in the Selection Grade and his pay shall not be fixed in the pay scale of the promotion post."**

(9) The learned counsel on the issue of retrospective amendment taking away the benefit already available has relied on a decision of a Constitutional Bench of the Supreme Court in Chairman, Railway Board and others V. C.R. Rangadhmaiah and others (1997) 6 SCC 623 paras 20 and 24 of which read as under:

> "20. It can, therefore, be said that rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, **but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g. promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively."**
>
> "24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. **It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under**

Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (AIR 1967 SC 1889), B.S. Yadav (AIR 1969 SC 118) and Raman Lal Keshav Lal Soni (1983) 2 SCC 33."

(10) In support of the contention that the retrospective amendment is invalid in case it takes away vested right of the petitioners,learned counsel for the petitioner placed reliance on a judgment of this Court in Chandra Mohan Singh & 185 others V. State of Rajasthan and others (2004(3) WLC (Raj.)413). Para 16 of the judgment reads as under:

> "16.Undeniably the aggrieved persons are Senior Teachers who before coming into force of the 1998 rules were receiving the benefit of existing pay scales No. 14 and 15 as indicted in Schedule I (i.e. Pay Scale of Rs.2000-3200 and Rs.2000-3500) and after giving effect to the revised pay scales from September 1, 1996 the Revised Pay Scale No.12 (i.e. Pay Scale of Rs.6500-10500) was given to them. **After issuance of the impugned notification with retrospective effect, the secured and vested rights of the petitioners, who were already receiving the benefit of Pay Scale of Rs.6500-10500 prior to July 1, 1998, have been taken away. A benefit that has accrued to the petitioners under the existing rules cannot be taken away by an amendment with retrospective effect and no statutory rule or administrative order can whittle down or destroy any right which has become crystalized and no rule can be framed under the Proviso to Article 309 of the Constitution which affects or impairs the vested rights. The act of the State of Rajasthan in issuing impugned notification retrospectively which have the effect of taking away a benefit already available to the petitioners under the existing rule is arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution."**

(11) In support of further submission that even otherwise, benefit of Rule 26-A RSR could not have been taken away by way of executive instruction more particularly Para 13 of the order dated 25.2.1992 which is applicable only to employees up to subordinate

service and not State Service, learned counsel has placed reliance on a decision of this Court in Jagdish Prasd Chandelia V. The State of Rajasthan reported in 2001(5) WLC (Raj.) 413. Relevant paras 20 and 21 of the decision are quoted below:

> "20. His right of consideration could not have been taken away by the executive instructions dated 21.10.1988 (Annexure-9) in anticipation of the amendment of the rules. The rule for consideration for the purpose of promotion was already there in the statute as discussed above. **A vested right has already accrued to the petitioner to be considered on 1.4.1988. No doubt the Government is competent to amend the rules retrospectively, but if any right had already accrued to a person for consideration on a particular date, that right cannot be taken away either by issuing executive instructions as has been done vide Annexure-9 and then by issuing notification dated 18.1.1990 as to effect the right of the petitioner as was available to him on 1.4.1988. Consequent to the above-said executive instructions Annexure-9 and the amendment from retrospective effect, the certain junior persons to the petitioner who were awarded the selection scale and were junior in the seniority became entitled to grant of super time scale by ignoring the right of the petitioner and thus the petitioner even being senior in the selection grade had become junior for the purpose of grant of super time scale; such action of the respondent does violates the right of the petitioner and is violative of Articles 14 and 16 of the Constitution of India and cannot be sustained in the eyes of law.**
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> 21. For the above-said discussion and reasons, the executive instructions Annexure-9 dated 21.10.1988 which virtually amounted to amendment in the rules itself and subsequent amendment published on August 1990 so far its retrospective effect is concerned, cannot be sustained in the eyes of law and is quashed. Consequently, the petition succeeds with the direction that the petitioner shall be entitled to consideration of super time scale under the then existing rules by ignoring the executive instructions Annexure-9 and the retrospective effect of the amendment of rule (Annexure-10) with all such consequential reliefs."

(12) Selection scale is given on the same post whereas promotion is always on higher post which results in exhaltation.

Selection scale also cannot be said to be a substitute for promotion as held by the Division Bench of this Court in Shri Agrawal Shiksha Samiti V. The State of Rajasthan and others (D.B. Civil Writ Petition No.5056/1994) decided on 24.3.2006, relevant portion of which is as follows:

> **"The main aim and object of the grant of selection scale is conferment of the higher scale on the same post on completion of 9, 18 and 27 years of service when a employee is not getting first, second and third promotion within the aforesaid period but the same cannot be a substitute for promotion as the promotion results in exaltation. The selection scale has been further provided to avoid stagnation on the same post also on account of achieving maximum of the scale and further the Full Bench of this Court in S.R. Higher Secondary School & Anr. V. Raj. Non-Government Educational Institutions Tribunal, Jaipur & 23 others, 2002 (3) WLC 586, in para No.17, has held that the grant of selection scale is not a promotion to higher post but a higher pay scale on the same post. Thus, the contention of the petitioner that grant of selection scale is a substitute for promotion, has no force and the question is answered in the manner that selection scale on the same post is not a substitute for promotion."**

(13) In view of above, the contention of the State that a government official cannot be given double benefit of fixation, one at the time of grant of selection scale and another at the time of promotion, is rejected.

(14) A bare perusal of the subject and other contents of the order dated 25.1.1992 more particularly para 13 would reveal that the said order is applicable only in case of Class-IV, ministerial and subordinate service but not on State Service. Therefore, it appears that para 13 could not be applicable in the case of petitioners who were raising

mainly the grievance of benefit of fixation on the State Service post – Accounts Officer as per main Rule 26-A RSR.

(15) The alternative submission of the learned counsel for the petitioner that foot-note cannot be allowed to take away the right given by the main rule is liable to be rejected in view of the judgment of this Court in Deep Chand Jain & anr. V. State of Rajasthan and anr. (1972 WLN 1015) in para 4 whereof it has been held that the Note is a part of rule which is further strengthened by the amended notification which has also been issued under Article 309 of the Constitution of India. Therefore, the amendment has to be construed as amending part of the rule.

(16) Another submission of the State that amendment of Note 4(i) below Rule 26-A RSR is formal in nature is also liable to be rejected as retrospective amendment from 25.1.1992 results in taking away the existing/accrued right of pay fixation as per main Rule 26-A RSR. Therefore, the said amendment also cannot be treated as amendment of formal nature.

(17) As discussed above, the main contentions of the petitioner on the issue of retrospective amendment and non-applicability of the selection grade circular dated 25.1.1992 in view of Rule 26A RSR are accepted and other contentions are rejected; whereas contention of

the State Government with regard to double benefit and amendment of formal nature are rejected. (18) The petitioners were granted selection scale on 28.2.1992 and further promoted on the post of Accounts Officer on 2.7.1992 and therefore, right of fixation existed and accrued in favour of the petitioners and further vested in them as per main Rule 26-A RSR and the same was also granted to some of them. The amendment made vide notification dated 18.8.1992 made effective from 25.1.1992 so far as its retrospective application part is concerned, is ultra vires Articles 14 and 16 of the Constitution of India. Para 13 of the executive instructions dated 25.1.1992 for grant of selection scale is not applicable to the State Service posts, as discussed above. Otherwise also, the said administrative instructions will not prevail over the main Rule 26-A RSR. So on both the counts benefit of fixation given at the time of grant of selection scale on 18 years' service and on promotion to the post of Accounts Officer was not liable to be withdrawn and further recovery in pursuance thereto is illegal.

(19) In the result, the writ petition is partly allowed. The impugned notification dated 18.8.1992 (Annexure-5) so far as its applicability with retrospective effect i.e. 25.1.1992 is concerned, is declared ultra vires Articles 14 and 16 of the Constitution of India.

(20) The respondents are directed to re-fix pay of the

petitioners as per the main Rule 26-A RSR as it existed on 02.07.1992 on the post of Accounts Officer with a further direction to grant arrears of re-fixation and pensionary benefits etc. within a period of three months from today.

(PREM SHANKER ASOPA) J.

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Selection scale is given on the same post whereas promotion is always on higher post which results in exhaltation. Selection scale also cannot be said to be a substitute for promotion as held by the Division Bench of this Court in Shri Agrawal Shiksha Samiti V. The State of Rajasthan and others (D.B. Civil Writ Petition No.5056/1994) decided on 24.3.2006, relevant portion of which is as follows:

> "It is well settled that no direction can be issued for promoting an employee. Only a direction for consideration for promotion as per existing rules or orders can be given. If any reference is needed, then we may refer the case of N.F. Sali Vs. State of Karnataka & Ors., reported in 1992(5) SLR 637 and Life Insurance Corporation of India & others V. Jagmohan Sharma & others, reported in 1998(9) SCC 219. In case there is no promotional avenues, then the Court certainly direct the respondents to create promotional avenues in the light of the aforesaid judgments of the Supreme Court and consider the case of employee accordingly."

Therefore, contention of the State that a government official cannot be given double benefit of fixation at the time of promotion is rejected. Another submission of the State that amendment of Note 4(i) below Rule 26-A RSR is formal in nature is also liable to be rejected as retrospective amendment from 25.1.1992 results in taking away the existing/accrued right of pay fixation as per main Rule 26-A RSR. Therefore, the said amendment also cannot be treated as amendment of formal nature.

++ As discussed above, the main contentions of the petitioner on the issue of retrospective amendment and non-applicability of the selection grade circular dated 25.1.1992 in view of Rule 26A RSR are accepted and other contentions are rejected; whereas contention of the State Government with regard to double benefit and amendment of formal nature are rejected.

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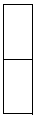
The alternative submission of the learned counsel for the petitioner that foot-note cannot be allowed to take away the right given by the main rule is liable to be rejected in view of the judgment of this Court in Deep Chand Jain & anr. V. State of Rajasthan and anr. (1972 WLN 1015) in para 4 whereof it has been held that the Note is a part of rule which is further strengthened by the amended notification which has also been issued under Article 309 of the Constitution of India. Therefore, the amendment has to be construed as amending part of the rule.



In view of the discussion made hereinabove, retrospective applicability part of order dated 18.8.1992(Annex.5) whereby Note 4 (i) below Rule 26-A RSR has been given retrospective effect from

25.1.1992 is liable to be declared ultra vires Articles 14 and 16 of the Constitution of India and the petitioners are declared entitled for fixation as per main Rule 26-A RSR on the post of Accounts Officer. Since the petitioners have retired, they are also entitled for revision of their pensionary benefits in the light of the pay fixation on the post of Accounts Officer, as detailed out hereinabove.